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Supreme Court of the United States

October Term, 1971

No. 71-317

ANNE R. SWORDS,

Petitioner,

v.

AMERICAN SEALANES, INC.,

Respondent.

Response To The Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Respondent, American Sealanes, Inc., files herewith its response in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit heretofore filed by petitioner.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, issued on June 4, 1971, is reported in 443 F.2d 1324 (4th Cir., 1971). Since this was a jury trial, no opinion was rendered in the proceedings in the United States District Court for the Eastern District of Virginia, except for a brief order denying respondent's motion for judgment notwithstanding the verdict or for a new trial, which is unreported.

STATEMENT OF THE CASE

The statement of the case as set forth in the petition for a writ of certiorari is correct with one exception. It is stated in petitioner's brief at the bottom of page 4 that, "There was no testimony that he [Swords] was seen alive after leaving the mess hall to go to his watch station in the bow of the ship." While it is technically correct that Swords was not seen alive after leaving the mess hall, there was evidence that he reached his watch station. His flashlight was found in the seat provided for him in the bow watch station (App., p. 4a) (Boggs depo. pp. 11, 14), and furthermore, Swords was not authorized to leave his station unless relieved by a standby (App., p. 4a) (Collins depo. pp. 20, 21).

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. Under The Facts Of This Case, There Is No Conflict Between The Decision Rendered By The Court Below And Decisions Rendered By This Court Or Other Courts Of Appeal.

Rule 19 of the Rules of the Supreme Court of the United States provides that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Pertinent among these reasons are where a Court of Appeals has rendered a decision in conflict with a decision of another Court of Appeals or with this Court, or where a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. No such special and important reasons exist in this case.

The decision of the Fourth Circuit Court of Appeals in this case was not in conflict with any applicable decision of

this Court, not to the contrary, was in accordance with the Court's rulings in previous cases. The Fourth Circuit was guided by this Court's decision in *Chicago, Milwaukee and St. Paul Railway Co. v. Coogan*, 271 U.S. 472 (1926). In that case, which involved a death action under the Federal Employer's Liability Act, the provisions of which are incorporated by reference into the Jones Act, it was alleged that the death of the plaintiff was caused by a bent air pipe along the railroad tracks where the plaintiff was working just prior to his death. It was contended that his foot was caught under the pipe and that he was unable to get out of the way of an approaching train.

In reversing a judgment for the plaintiff in the trial Court, this Court stated at page 478 that:

> "When the evidence and conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. This is not enough."

Similarly, the Fourth Circuit, following this teaching, found that the evidence in this case was not sufficient to justify submission of the issue of causative unseaworthiness to the jury.

The decision in *Lavender v. Kurn*, 327 U.S. 645 (1946), is not to the contrary. There the decision rested on facts giving rise to an inference of proximate cause. The evidence was that the plaintiff's body was found near the track with a fractured skull shortly after he had thrown a switch to permit a train to back into a station. There was evidence that there was a mail hook hanging down loosely on the outside of the mail car of the train which was at a height to

have struck plaintiff in the head considering where he was probably standing at the time of the accident. While no one witnessed plaintiff's death, this testimony was held to supply a premise for the inference that carelessness in the railroad activity was the proximate cause of the accident.

No such evidence was presented in the present case or in *Coogan, supra,* to show a probable connection between the alleged unsafe condition and the deaths of the plaintiffs; rather there was a total lack of probative facts to support this conclusion.

As the Fourth Circuit stated, because of the vast difference in its circumstances, *Schultz* v. *Pennsylvania R. Co.,* 350 U.S. 253 (1956) is likewise not precedent contra. There, the decedent was required to tend four tugboats tied together side by side. Three were unlighted and the other only slightly illuminated. There was evidence that the decedent's duties required him to go from boat to boat and to the pier. His body was found in the water near the boats. The Court found that it was a fair inference that the conditions existing proximately caused the accident. Again, no such facts existed in our case. There was a total absence of any evidence from which a fair inference could be drawn connecting the alleged unseaworthy condition to the disappearance of Swords from his watch station on the bow of the vessel.

Similarly, the decision of this Court in *Butler* v. *Whiteman,* 356 U.S. 271 (1957) is not in conflict with this case. While there were no witnesses to the accident, the deceased had been seen running across a barge, which was moored to the wharf, to a tug lashed to the barge and there was evidence no gangplank had been provided for crossing between the two. It could thus be reasonably inferred that the deceased fell while crossing from one vessel to the other be-

cause of the lack of a gangplank. Under these circumstances, the Supreme Court held that it was for the jury to decide whether or not employer negligence played a part in producing decedent's death. Here, there was no evidence from which a causal relationship between the sagging chain rail and Swords' disappearance could be reasonably inferred. In fact, the evidence that Swords' flashlight was found at his watch station indicated without contradiction that he had reached his station in the bow, where he was required to remain until relieved. It should also be noted that in our case, unlike *Butler,* the Court below did not enter judgment for defendant on the entire case, but merely remanded the case for a new trial limited to the issue of negligence.

Nor is the decision of the Fourth Circuit in conflict with decisions of any other Court of Appeals. The cases cited by petitioner from other Courts of Appeals are not in point.

The case of *Pollard* v. *Seas Shipping Co., Inc.,* 146 F.2d 875 (2nd Cir. 1945) is cited as a decision directly in conflict with the Fourth Circuit's decision here. In *Pollard,* it was contended that the deceased crewman fell overboard and drowned because of a defective catwalk and railing. While there were no eye witnesses to the accident, one witness testified that as he was walking on or near the catwalk he heard a "crash, a cry and a splash" which took place about twenty feet behind him and that he recognized the cry as that of the deceased crewman. Furthermore, the witness stated that when he went back, he found a three foot section of broken railing. Upon this evidence, the Court held that, while close, the question of negligence and proximate cause was for the jury.

In *Pollard,* there was evidence of probative facts upon which a jury could infer the required causal relationship.

In the instant case, there was a dearth of any evidence to relate the sagging chain rail to the disappearance of Swords. *Pollard* is therefore not in conflict with the decision of the Fourth Circuit in this case.

Closer to this case is the decision of the Second Circuit in *Miller* v. *Farrell Lines, Inc.*, 247 F.2d 503 (2nd Cir. 1957), where suit had been brought to recover damages under the Jones Act for the loss of decedent overboard. As here, the Court found that plaintiff had failed to introduce evidence of any probative facts to demonstrate that defendant's negligence proximately caused the death of the seaman. Therefore, submission to the jury would have been an invitation for an indulgence in a series of legally improper speculations.

Neither does the decision of the Fifth Circuit in *Davis* v. *Parkhill-Goodloe Co.*, 302 F.2d 489 (5th Cir. 1962) point to a conflict in the circuits. There, the decedent was last seen walking toward shore on a drainage pipe equipped with walking planks. The next day his body was found floating in the water in the same general vicinity where he had last been seen. The Court of Appeals reversed a lower Court decision for the defendant, holding the defendant guilty of negligence as a matter of law for failure to require the seaman to wear a life vest, and finding that the question of proximate cause was an issue for the trier of fact. This case is clearly distinguishable from the present case, since there was evidence of probative facts from which an inference of causation could be made. In other words, in *Davis,* there was "substantial support" for plaintiff's contention of a causal connection between the seaman's death and defendant's negligence in failing to supply him with a life vest, while here such "substantial support" is entirely lacking. There was no evidence to relate the seaman's death

to the sagging chain rail, and to allow the jury to consider this question places the matter in the realm of speculation and conjecture.

The cases cited by petitioner pertaining to the inference of proximate cause in unexplained sinking cases are not in point. In all of these cases there was evidence of negligence or unseaworthiness which the Court could reasonably find was the cause of the sinking and the death of the crewmember. In the case at issue there was a total lack of any probative evidence to relate the alleged unseaworthy condition to the death of the seaman. Furthermore, in the unexplained sinking cases the Court refers to the permissible inference, akin to *res ipso loquitur,* that the requisite legal cause may be found from evidence of negligence and/or unseaworthiness on the one hand and disappearance of the vessel on the other. See *Admiral Towing Co.* v. *Woolen,* 290 F.2d 641 (9th Cir. 1961). This particular theory is peculiar to this type of case and could certainly not be applied in a case such as the one now before the Court. To do so would mean that the mere showing of disappearance plus some unseaworthy condition existing somewhere on the vessel would be sufficient to create a jury question as to proximate cause. This, we contend, is not the law and is not enough to justify the submission of this issue to the jury.

2. There Was No Important Question Of Federal Law Decided By The Court Of Appeals Which Has Not Been Decided By This Court.

Petitioner asks for a writ of certiorari for the additional reason that there is an important question of federal law which has never been decided by this Court. Petitioner contends that the Court should clarify the comparative burdens of proof in unseaworthiness and Jones Act cases as well as defining the elements of unwitnessed death cases generally.

The Court has directed itself to these questions on many occasions and its decision in *Chicago, Milwaukee and St. Paul Railway Co.*, v. *Coogan, supra,* dealt directly with an unwitnessed death claim and is controlling in this case.

CONCLUSION

For the reasons set forth herein, the Court should deny the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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